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November 3, 2005

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Hearing Officer's Decision

Name of Case: Personnel Security Hearing

Date of Filing: June 15, 2005

Case Number: TSO-0253

This Decision concerns the eligibility of XXXXXXXXXXXXXXXX (hereinafter "the individual") to hold an access authorization.¹ The regulations governing the individual's eligibility are set forth at 10 C.F.R. Part 710, "Criteria and Procedures for Determining Eligibility for Access to Classified Matter or Special Nuclear Material." This Decision will consider whether, based on the testimony and other evidence presented in this proceeding, the individual's suspended access authorization should be restored. As discussed below, I find that access authorization should not be restored in this case.

I. BACKGROUND

This administrative review proceeding began with the issuance of a notification letter by a Department of Energy (DOE) Office, informing the individual that information in the possession of the DOE created substantial doubt pertaining to his eligibility for an access authorization in connection with his work. In accordance with 10 C.F.R. § 710.21, the notification letter included a statement of the derogatory information causing the security concern.

The security concern cited in the letter involves the individual's excessive use of alcohol. In this regard, the letter cited his arrest for DWI in 1995. After that incident, the individual was

^{1/} An access authorization (or security clearance) is an administrative determination that an individual is eligible for access to classified matter or special nuclear material. 10 C.F.R. § 710.5.

sent to the DOE consultant psychiatrist for an evaluation. During that evaluation, the individual stated that he would abstain from alcohol in the future. Based on a consideration of all relevant factors, it was the opinion of the DOE consultant psychiatrist that the individual was not using alcohol habitually to excess, and was not an abuser of alcohol or alcohol dependent.

The letter further stated that the individual was arrested again in December 2003 for driving while intoxicated. In October 2004, he was sent for an evaluation by the same DOE consultant psychiatrist. This time, the consultant psychiatrist diagnosed the individual as alcohol dependent, without evidence of reformation or rehabilitation. This conclusion was set forth in the consultant psychiatrist's evaluation letter of November 2004. According to the notification letter, this constitutes derogatory information under 10 C.F.R. § 710.8(j)(hereinafter Criterion J). ²

The notification letter also stated that the consultant psychiatrist found that alcohol dependence causes or may cause a defect in the individual's judgment or reliability. This is a security concern under 10 C.F.R. § 710.8(h).

The DOE consultant psychiatrist recommended that in order to show rehabilitation, the individual should demonstrate abstinence from alcohol for a period of three years and attend AA meetings with a sponsor at least once a week for a minimum of 300 hours over at least a three-year time frame.

The letter also cited an event that took place in December 1999 in which the individual was arrested for attempt to commit first degree murder. The individual consumed alcohol prior to the incident. The letter cites this incident as giving rise to a security concern under 10 C.F.R. § 710.8(l) (Criterion L). ³ The

2/ Criterion J security concerns relate to an individual's use of alcohol habitually to excess, or to an individual's having been diagnosed by a psychiatrist or licensed clinical psychologist as alcohol dependent or as suffering from alcohol abuse.

3/ Criterion L pertains to unusual conduct or is subject to circumstances that tend to show he is not honest, reliable or trustworthy, or that furnish reason to believe he may be subject to pressure, coercion, exploitation or duress, which

(continued...)

record in this case also indicates that in a letter of July 31, 2001 to the individual, the Director of the Personnel Security Division for the DOE office stated that the criminal charges were dropped, and no further DOE personnel security action would be taken regarding this incident at that time. Given this history, the DOE counsel in the present administrative review proceeding stipulated that if the individual resolved the Criteria J and H alcohol-related issues, there would be no need for a separate resolution of the Criterion L charge. Accordingly, no evidence was taken specifically about this incident. Transcript of Hearing (hereinafter Tr.) at 7-8.

The notification letter informed the individual that he was entitled to a hearing before a Hearing Officer, in order to respond to the information contained in that letter. The individual requested a hearing, and that request was forwarded by the DOE Office to the Office of Hearings and Appeals (OHA). I was appointed the Hearing Officer in this matter. In accordance with 10 C.F.R. § 710.25(e) and (g), the hearing was convened.

At the hearing, the individual testified on his own behalf, and presented the testimony of 4 friends, relatives and colleagues. He also presented testimony from his AA sponsor, his Employee Assistance Program (EAP) counselor, the chief psychologist with the occupational medicine group associated with the individual's place of employment (chief psychologist), and a psychiatrist who evaluated him for this proceeding (individual's psychiatrist). The DOE Counsel presented the testimony of a DOE security specialist and the DOE consultant psychiatrist.

II. Hearing Testimony and Documentary Evidence

A. Documentary Evidence Presented at the Hearing

At the hearing the individual presented evidence documenting numerous alcohol tests performed in connection with his employee assistance program counseling. They were all negative. Individual's Hearing Exhibit B. The individual also submitted a record showing attendance at AA meetings beginning in December 2003 and continuing through September 2005. Individual's Hearing Exhibit A.

3/ (...continued)

may cause him to act contrary to the best interests of the national security.

B. Testimony

1. The Individual

The individual testified that he has not used alcohol since the time of his December 2003 arrest and has no plans to use alcohol again. Accordingly, as of the time of the hearing, he had maintained abstinence for about 21 months. He believes that alcohol causes significant problems for him. He testified that continuing with his AA group and his EAP counseling are very important factors in his life. Furthermore, maintaining a stable environment for his family helps him to focus on remaining alcohol free. He testified that after his arrest in 1995, he thought he would be able to maintain abstinence from alcohol without outside help. He is now convinced that he must continue with AA and with support of his religious activities in order to maintain abstinence. Tr. at 138-148.

2. AA Sponsor

The AA sponsor testified that he has known the individual for about one and one-half years in the AA program. He confirmed that the individual is honest and has admitted that he has an "alcohol problem." The AA sponsor indicated that in his view, a sign of impending relapse would be that an AA member ceases coming to meetings. The sponsor indicated that this was not true for the individual. He regularly attends AA meetings, usually about four or five times a week, and is conscientiously working through the 12-step program. He stated that the individual is beginning to help others in the program and provide service to the organization. Tr. at 53-63.

3. Chief Psychologist

This witness stated that it is his responsibility to certify employees for the "Human Reliability Program" (HRP, previously known as PSAP) at the facility where the individual works. He evaluated the individual in March 2004 and found that he should not be recertified at that time, based on failure to exercise good judgment in regard to his alcohol use. He believed that the individual should receive EAP counseling and random alcohol testing. He reevaluated the individual on several occasions and in July of 2004 determined that the individual could be returned to HRP status, but should continue AA involvement, EAP counseling, and abstinence from alcohol. He believed that a six-month abstinence

period was adequate. Tr. at 92-94, 98. See also DOE submission of June 15, 2005.

The chief psychologist testified that he believes that the individual had a "problem with alcohol," but was not an alcohol abuser or alcohol dependent. He believed that as long as the individual continues to participate in AA, his risk of returning to "problem drinking" is low. Tr. at 99. According to the witness, another "positive indicator" is that the individual has remained abstinent for more than one year. Tr. at 104. However, this witness also stated that he based the necessary abstinence period on his view that the individual was not an alcohol abuser or alcohol dependent. Tr. at 102. Further, this witness indicated that he had limited knowledge of the individual's full alcohol history. For example, he did not have access to the individual personnel security file, including the DOE consultant psychologist's evaluation, or the individual's personnel file from his employment. Tr. at 94-95; 103.

4. EAP Counselor

This witness indicated that he is a licensed professional clinical mental health counselor. He stated that he treated the individual after his 1995 DWI and followed him for about two years. He stated that the individual returned for more treatment in 2003 after his second DWI. He sees the individual once a week. He confirmed that since the 2003 DWI incident, the individual has had about 35 random alcohol tests, all of which were negative. He was impressed with the individual's commitment to AA, and is confident that he is not using alcohol. He believes that unlike the time of the individual's 1995 DWI incident, this time the individual is more mature, is more committed to preserving his family stability and is truly committed to remaining in the AA program. He also stated that the individual's 21-month abstinence period was sufficient. In his view there was not a significant difference between that abstinence period and the 36 month period that the DOE psychiatrist recommended in his evaluation. Tr. at 115-134.

5. Individual's Psychiatrist

This witness stated that he is board certified in psychiatry and is the medical director of a hospital located in a neighboring state. He is a consultant to the EAP division at the individual's place of employment. He was in agreement with the DOE consultant psychiatrist's diagnosis that the individual suffered from alcohol dependence. He also believed that as of the time of the hearing,

there was about a 20 percent risk of relapse for this individual, given his 21 month abstinence and AA attendance period. He believed that with ongoing oversight, random screens, and the supervision of the EAP and the HRP, the individual was fit for duty and could return to work. He testified that it would not be responsible to allow the individual to return to work without such oversight. Tr. at 71-88.

6. Character Witnesses

The individual presented 4 character witnesses. These included 2 friends/coworkers, a past supervisor and a cousin. The friends/coworkers had known him for a number of years. Tr. at 10, 23. Both of these witnesses confirmed that they had not seen the individual use alcohol since December 2003. Tr. at 17, 28. The individual's supervisor stated that he has known the individual for about 5 years and has not seen him use alcohol since about Christmastime of 2003. Tr. at 35,37. The individual's cousin did not see him very often, but indicated that she was present at the time of the 2003 arrest. Tr. at 50.

7. Security Specialist

This witness indicated that he has worked at the Department of Energy as a federal personnel security specialist for four years. He stated that he is in charge of federal oversight of the administrative review process in these Part 710 hearings. Tr. at 108. He testified that there is no guideline as to what "relapse percentage" would constitute adequate evidence of rehabilitation or reformation. In each case, the DOE relies on the judgment of the consultant psychiatrist who evaluated the employee. Tr. at 14.

8. The DOE Consultant Psychiatrist

After listening to the testimony of all the above witnesses, the DOE consultant psychiatrist was convinced that the individual had maintained abstinence for the period since December 2003, and had also attended AA meetings since that time. He was persuaded that the individual was very serious about both his commitment to abstinence and the AA program. However, the consultant psychiatrist maintained that in order to demonstrate reformation/rehabilitation, the individual still needed to remain abstinent for at least three years and participate in AA for that same period. In this regard, the consultant psychiatrist believed that as of the time of the hearing, with a 21 month abstinence period, the individual still had a 20 percent risk of relapsing within the next five years. He did

not believe that this was "adequate evidence" of rehabilitation. Tr. at 154. He believed that a "conservative" approach was warranted in this case, given the fact that the individual had relapsed after the 1995 DWI incident. Tr. at 152-60.

III. Applicable Standards

A DOE administrative review proceeding under 10 C.F.R. Part 710 is not a criminal case, in which the burden is on the government to prove the defendant guilty beyond a reasonable doubt. In this type of case, we apply a different standard, which is designed to protect national security interests. A hearing is "for the purpose of affording the individual an opportunity of supporting his eligibility for access authorization." 10 C.F.R. § 710.21(b)(6). The burden is on the individual to come forward at the hearing with evidence to convince the DOE that granting or restoring his access authorization "would not endanger the common defense and security and would be clearly consistent with the national interest." 10 C.F.R. § 710.27(d).

This standard implies that there is a strong presumption against the granting or restoring of a security clearance. See Dep't of Navy v. Egan, 484 U.S. 518, 531 (1988) ("the clearly consistent with the interests of the national security test" for the granting of security clearances indicates "that security-clearance determinations should err, if they must, on the side of denials"); Dorfmont v. Brown, 913 F.2d 1399, 1403 (9th Cir. 1990) (strong presumption against the issuance of a security clearance). Consequently, it is necessary and appropriate to place the burden of persuasion on the individual in cases involving national security issues. Personnel Security Hearing (Case No. VSO-0002), 24 DOE ¶ 82,752 at 85,511 (1995).

Once a security concern has been found to exist, the individual has the burden of going forward with evidence to rebut, refute, explain, extenuate or mitigate the allegations. Personnel Security Hearing (VSO-0005), 24 DOE ¶ 82,753 (1995), aff'd, 25 DOE ¶ 83,013 (1995). See also 10 C.F.R. § 710.7(c).

IV. Analysis

The issue in this case is whether the individual has mitigated the Criteria J, H and L concerns, by demonstrating that he is reformed and/or rehabilitated from his alcohol dependence. As discussed below, I find that the individual has not resolved those security concerns.

I believe that, as he contends, the individual has been abstinent from alcohol since December 2003. The AA sponsor testified convincingly in this regard, as did the EAP counselor. Both of these witnesses have known the individual for a considerable period of time and see him frequently. Their positive testimony was especially persuasive. Further, the individual's character witnesses who had knowledge of this matter corroborated the individual's testimony that he has been abstinent since December 2003.

I am also convinced that the individual has completed at least 300 hours of AA attendance. His sponsor confirmed that the individual attends AA meetings at least four or five times a week. The individual has also submitted records of his attendance at AA meetings showing approximately 300 hours of participation during the period December 2003 through September 2005. Individual's Hearing Exhibit A.

I must therefore consider whether, based on this very positive showing, the individual has demonstrated rehabilitation and/or reform. As indicated by the testimony described above, there is certainly significant evidence in this case to support the individual's position that he is rehabilitated. The chief psychologist testified that the individual could be returned to HRP status. The EAP counselor believed that the individual's abstinence period was sufficient. The individual's psychiatrist believed that the individual was fit for duty and could return to work with appropriate monitoring.

The DOE consultant psychiatrist took a different position. He believed that the individual's 21-month abstinence period was not sufficient. In his view, the 36-month abstinence period that he originally recommended was still necessary. He also believed that even though the individual had attended 300 hours of AA meetings, this was not accomplished in the three year time frame that the consultant psychiatrist had recommended. He believed that the three-year period was necessary for the individual to fully internalize the AA precepts. Tr. at 152. ⁴

4/ I recognize that both psychiatrists testified that the individual has a 20 percent risk of relapse in the next five years. I believe that in this case I should give paramount importance to my assessment of whether the individual has demonstrated a solid and sustained pattern of abstinence and commitment to AA that is sufficient, given his overall personal history.

Although I believe the individual has come a long way and has made great progress, I am in the end convinced by the view of the DOE consultant psychiatrist. I therefore believe that an additional period of time is necessary in order to resolve the Criterion J security concerns involved in this case.

As an initial matter, I find that the testimony of the chief psychologist should be accorded little weight. It was his opinion that the individual had an "alcohol problem," but was not alcohol dependent or an abuser of alcohol. He believed that a six-month abstinence period was sufficient. The other experts clearly disagreed with that diagnosis. This witness also stated that in making his diagnosis, he did not have access to all the individual's records. I find that the chief psychologist did not have a thorough understanding of the seriousness of this individual's alcohol problems. I can therefore not accept his view that the individual has a low risk of returning to problem drinking, or that his abstinence period was sufficient.

Similarly, I was not convinced by the testimony of the EAP counselor that the individual's 21-month abstinence period was sufficient. It was his view that there was not a significant deference between this 21-month period and the 36-month period recommended by the DOE psychiatrist. Tr. at 132. In my opinion, the fifteen-month difference is a considerable period. I cannot disregard it without a persuasive reason.

I was also not persuaded by the view of the individual's psychiatrist that the 21-month abstinence period and the individual's AA attendance for that period were sufficient to demonstrate rehabilitation. His opinion was less informed than that of the DOE consultant psychiatrist. As an initial matter, the individual's psychiatrist testified that he was not particularly familiar with the requirements and considerations applicable to Part 710. His judgment was based on whether he believed the individual was "fit to return to work," that is, perform his actual on the job duties. Tr. at 74-75.

This witness used a standard that is not appropriate in Part 710 cases. My consideration here is whether the individual is fit to hold a security clearance, a different issue from whether he is able to perform his job. It involves a determination as to whether the individual is overall able to maintain a standard of conduct, both on and off the job, that conforms to that expected of persons who hold a security clearance. See, *Personnel Security Hearing* (Case No. VSO-0129), 26 DOE ¶ 82,781 (1997). The "fitness to return to work" standard applied by the individual's psychiatrist does not reflect the entire focus of my considerations. I do not believe

that this witness was particularly informed about the extent and nature of my inquiry here. Consequently, I cannot accord much credence to his opinion on this issue.

Further, in making his judgment, the individual's psychiatrist admittedly did not have access to all of the individual's personnel records. Tr. at 70. I therefore believe that he was not as informed as the DOE psychiatrist who did have full access to the individual's history, and who therefore had more overall familiarity with this individual's situation.⁵

Moreover, the recommendation of the individual's psychiatrist that the individual was "fit" to return to work was not without qualification. He testified that it would not be "responsible" to allow the individual to return to his job without supervision and oversight of EAP and HRP. Tr. at 73-74. I must make a determination regarding eligibility for access authorization that does not require continued oversight. While conditional grants of access authorization are within the discretion of the Office of Security, it is not within my authority under Part 710 to consider granting this type of security clearance. *Personnel Security Hearing* (Case No. TSO-0184), 29 DOE ¶ 82,818 (2005).

I recognize that the individual believes that his continued participation in AA ensures that he will not relapse as he did after the 1995 DWI, when he did not commit to the AA program. I believe that his participation has been important and is significant, but I am persuaded by the DOE consultant psychiatrist's view that the 21-month period is not adequate. In this regard, I note that it is quite common in cases involving alcohol dependence to require an individual to demonstrate two years of abstinence and AA attendance. *E.g., Personnel Security Hearing* (Case No. TSO-0142), 29 DOE ¶ 82,788 (2005). The individual in this case has not even demonstrated abstinence and AA participation at the 24 month level. Moreover, the fact that he has had a serious relapse in the past after a long period of abstinence is another reason supporting my finding that the 21-month period is inadequate in this case.

Based on the above considerations, I find that the individual has also not resolved the Criterion H and Criterion L concerns set out in the notification letter.

^{5/} In fact, as stated above, the DOE psychiatrist had evaluated him several years earlier after the 1995 DWI.

V. CONCLUSION

As the foregoing indicates, the individual has not resolved the Criterion J, H and L security concerns cited in the notification letter. It is therefore my decision that restoring this individual's access authorization is not appropriate at this time.

The parties may seek review of this Decision by an Appeal Panel under the regulation set forth at 10 C.F.R. § 710.28.

Virginia A. Lipton
Hearing Officer
Office of Hearings and Appeals

Date: November 3, 2005